Supreme Court, U.S.
FILED
NOV 30 1995
CLERK

No. 95-1257

In The
Supreme Court Of The United States
October Term 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

MARIAN MCCLAMY, ADMINISTRATOR OF THE ESTATE OF STANLEY R. McGILL,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

NICHOLAS T. SCOTT

Respondent.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

Steven P. Kramer, Counsel of Record
Kramer & Kramer
[illegible] Wilshire Blvd. #1900
[illegible], CA 90025
(310) [illegible]

Attorneys for Respondents

BEST AVAILABLE COPY

33 pp

QUESTION PRESENTED

Whether the doctrine of equitable tolling, presumed to apply to claims against the government, as expressed in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), is applicable to toll limitations periods for tax refund claims under 26 U.S.C. §§6511(a) and (b).

TABLE OF CONTENTS

Page

STATEMENT 1

SUMMARY OF ARGUMENT..... 5

ARGUMENT 7

NO GROUND EXISTS FOR NOT APPLYING THE REBUTTABLE PRESUMPTION IN FAVOR OF EQUITABLE TOLLING IN THE CONTEXT OF TAX REFUND CLAIMS..... 7

A. THE LEGISLATIVE HISTORY OF TAX REFUND LITIGATION SUPPORTS A CONCLUSION THAT CONGRESS INTENDED EQUITABLE TOLLING TO APPLY TO SUCH SUITS 7

B. THE STRUCTURE OF §6511 IS SUCH THAT IF THE PERIODS IN §6511(a) ARE AMENABLE TO TOLLING, THE "LOOK-BACK" PERIODS IN §6511(b) SHOULD BE TOLLED FOR THE SAME PERIODS 13

C. THE LEGISLATIVE HISTORY OF §6511(b) REVEALS THAT THE "LOOK-BACK" PERIODS OF §6511(b) WERE NOT INTENDED TO BE ABSOLUTE BARS, BUT WERE INTENDED TO MAKE THE TIME THAT A TAXPAYER HAS TO FILE A REFUND CLAIM CO-EXTENSIVE WITH THE PERIOD THAT THE COMMISSIONER HAS TO ASSESS A TAX AGAINST THE TAXPAYER 13

D. THE OVERALL STRUCTURE OF OUR SYSTEM OF TAX COLLECTION, BASED AS IT IS UPON SELF-ASSESSMENT, SUPPORTS A CONCLUSION THAT CONGRESS INTENDED EQUITABLE TOLLING TO APPLY TO TAX REFUND CLAIMS 22

TABLE OF CONTENTS – Continued

Page

E. IN THE EVENT THAT THE PERIOD THAT A TAXPAYER HAS TO FILE A REFUND CLAIM IS TOLLED, THE PERIOD THAT THE COMMISSIONER HAS TO ASSESS ADDITIONAL TAX SHOULD BE TOLLED FOR A COMMENSURATE PERIOD..... 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

Bull v. United States, 295 U.S. 247 (1935) 3

Capital Tracing, Inc. v. United States, 63 F.3d 859 (9th Cir. 1995) 12

Cary v. Curtis, 44 U.S. (3 How.) 236 (1845) 8

City of Philadelphia v. The Collector, 72 U.S. (5 Wall) 720 (1867) 9

Commissioner v. Dane-Wells, 321 U.S. 219 (1994) 23

Commissioner v. Lundy, ___ U.S. ___ (1996) 13

Curits's Administratrix v. Fiedler, 67 U.S. (2 Black) 461 (1862) 7

Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836) 7, 8, 9

Flora v. United States, 362 U.S. 145 (1960) 7, 10

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 5, 12, 23

Jones, Collector v. Liberty Glass Co., 332 U.S. 524 (1947) 17

Lewis v. Reynolds, 284 U.S. 281 (1932) 10

Medellin v. Shalala, 23 F.3d 197 (8th Cir. 1994) 12

Miller v. United States, 38 F.3d 473 (9th Cir. 1994) 19

Nunnally v. MacCausland, 996 F.2d 1 (1st Cir. 1993) 12

Oropallo v. United States, 994 F.2d 25 (1st. Cir. 1993), *cert. denied*, 114 S. Ct. 705 (1994) 3, 19, 20

Smietanka, Collector v. Indiana Steel Co., 257 U.S. 1 (1927) 9

TABLE OF AUTHORITIES – Continued

Page

Stone v. White, 301 U.S. 532 (1937) 7

United States v. Arthur Young & Co., 465 U.S. 805 (1984) 22

United States v. Dalm, 494 U.S. 596 (1990) 3

United States v. Felt & Tarrant Mfg., Co., 283 U.S. 269 (1931) 9, 23

United States v. Jefferson Electric, 291 U.S. 386 (1933) 8

United States v. Kales, 314 U.S. 186 (1933) 9, 10

United States v. Williams, ___ U.S. ___ (1995) 9

Webb v. United States, 66 F.3d 691 (4th Cir. 1995), *petition for cert. pending*, No. 95-1360 12

STATUTES:

Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 8

Act of March 3, 1839, 5 Stat. 339 8

Act of March 3, 1887, ch. 359, 24 Stat. 505 (Tucker Act) 10

Act of March 4, 1923, ch. 276, §252(a), 42 Stat. 1504 15

Act of July 30, 1954, ch. 648, §1, 68 Stat. 589 10

Internal Revenue Code of 1939 (26 U.S.C.) 17

§322 ..... 17, 18

§322(b)(1) 18, 19

§322(b)(3) 17

TABLE OF AUTHORITIES – Continued

Page

Internal Revenue Code of 1954 (26 U.S.C.)
§6511(a) 18, 19
Internal Revenue Code of 1986 (26 U.S.C.)
§6511 ..... *passim*
§6511(a) ..... *passim*
§6511(b) ..... *passim*
§6511(b)(2)(A) 13, 20
§6511(b)(2)(B) 13
§7422(f) 11
§7422(f)(1) 11
Pub. L. 89-713, §2(a), 89th Cong. 2d Sess. 11
Revenue Act of 1916, ch. 463, §14(a), 39 Stat. 756 13
Revenue Act of 1918, ch. 18, §252, 40 Stat. 1057 14
Revenue Act of 1924, ch. 234, §281(b), 43 Stat. 301 §1014, 43 Stat. 343 ..... 9, 15, 17
Revenue Act of 1942, ch. 619, Pub. L. No. 753, §169 17
Rev. Stat. §989 (1875) 9
Technical Amendments Act of 1958, §82 20
28 U.S.C. §842 9
28 U.S.C. §1346(a)(1) 11

TREATISES:

15 Mertens, *Law of Federal Income Taxation*, §58.02 (1996) 18, 20
M. Saltzman, *IRS Practice and Procedure*, ¶ 11.05 at 11-26 - 11-27 (1996) 22

TABLE OF AUTHORITIES – Continued

Page

2 J. Seidman, Legislative History of Federal Income and Excise Profits Tax Laws, 1953-1939 (1954). 17
J. Seidman, Legislative History of Federal Income Tax Laws, 1938-1861 (1938) 14, 16

MISCELLANEOUS:

Bianco, *Tax Refund Suits and Equitable Tolling of the Statute of Limitations: Webb v. United States*, 49 Tax Lawyer 747 (1996). 12
65 Cong. Rec. 7209 (1924). 16
Danos, "Special Report," *Tax Notes*, April 17, 1995 19
H.R. Rep. No. 2333, 77th Cong. 2d Sess. (1942). 17
Plumb, Jr. *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 685 (1947) 8
S. Rep. No. 398, 68th Cong. 1st Sess 33 (1924) 16
S. Rep. No. 617, 65th Cong., 3rd Sess. 10 14
S. Rep. No. 1625, 3 U.S. Code Cong. & Admin. News 3681 (1966). 11
Stand. Fed. Tax Rep., Sept. 4, 1958 (CCH) ("1958 Federal Income Tax Law Changes Explained,") ¶ 291, No. 39 20
Stein, "Will Equitable Tolling of the Statute of Limitations Gain Wider Acceptance in Tax Cases?" 81 J. Tax. 370 (Dec. 1994) 19
Treas. Reg. §301.6402-2(b) 23

STATEMENT

A. *United States v. Brockamp*

1. Respondent Marian Brockamp is the administrator and sole beneficiary of the estate of her father, Stanley McGill. On or about April 16, 1984, Mr. McGill, then aged 93, issued a personal check in favor of "Internal Revenue Service" in the sum of $7,000. The check did not indicate whether the $7,000 remittance was for income, gift or any other type of tax, or the period for which the remittance applied. Mr. McGill did not file an income tax return for 1983 or for any of the five remaining years of his life, and the $7,000 remittance was the last he ever made. When the check was received by the Internal Revenue Service, it was placed in a "suspense" account, and on July 15, 1986 was transferred into an "Excess Collection Account." (Pet. App. 2a-3a.) The Service never made an assessment of the $7,000. (Pet. App. 22a.)

2. Beginning in the late 1970's, Mr. McGill's health began to deteriorate, and he developed the classic symptoms of senile dementia. He began to look dazed and disoriented, and would walk about the house naked, unaware of his nakedness. On one occasion, he went to the corner mailbox in a state of undress, and when confronted with his act, was unaware of what had happened. He could no longer remember recent conversations. He would begin to dial a telephone, and suddenly forget whom he was calling. He developed troubles with his checkbook; bills for $1000 and $400 would be paid with checks for $1,000 and $4,000. As a result of his dangerous forgetfulness, Respondent convinced Mr. McGill to give

her son some checkwriting authority, and he agreed. It is likely, however, that he forgot this conversation as well.[1]

3. In response to Requests for Admissions, Petitioner admitted that Mr. McGill, who had long since retired, did not have an income in 1983 that could have resulted in a $7,000 tax liability. (Pet. App. 7a.)

4. Following Mr. McGill's death on November 7, 1988, Respondent discovered the $7,000 check in Mr. McGill's belongings. After she was appointed administrator of his estate, she wrote the IRS, requesting that the $7,000 be returned. The Service refused, noting that the taxes had been paid "more than three years prior to her claim." (Pet. App. 18a-19a.)

5. Respondent thereafter commenced this tax refund action, alleging, *inter alia*, that the general rule enunciated in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), *viz.*, that the doctrine of equitable tolling applies against the Government to the same extent that it applies against private parties, should apply with equal force to tax refund suits. (Pet. App. 3a.)[2]

6. In granting the Petitioner's Motion for Summary Judgment, the District Court relied principally on the

---

[1] As the district court litigation was determined upon the Petitioner's Motion for Summary Judgment, the foregoing factual recitation is derived from Respondent's Declaration.

[2] The District Court litigation was decided upon Cross-Motions for Summary Judgment. The gravamen of the Respondent's Motion for Summary Judgment was that since the IRS had never assessed the $7,000 remittance, it was not a "payment" of tax, but remained in the nature of a refundable deposit.

First Circuit's decision in *Oropallo v. United States*, 994 F.2d 25 (1993), *cert. denied*, 114 S. Ct. 705 (1994), and this Court's decision in *United States v. Dalm*, 494 U.S. 596 (1990). In *Oropallo*, the First Circuit held that the limitations periods imposed by §6511 of the Internal Revenue Code and the doctrine of equitable tolling were "fundamentally inconsistent." In *Dalm*, this Court, limiting its holding in *Bull v. United States*, 295 U.S. 247 (1935) held that the doctrine of equitable recoupment could not be the sole ground for extending the limitations periods of §6511.

7. The court of appeals reversed, Judge Fernandez dissenting. In holding that equitable tolling could, in an appropriate case, toll the periods of limitations contained in §6511, the court noted that this Court's decision in *Irwin* was subsequent to, and effectively modified, this Court's decision in *Dalm*. In so doing, the Court of Appeals observed:

> "We think the facts as alleged by Mrs. Brockamp demonstrate why equitable tolling should apply in some tax cases. In this instance, it would be unconscionable to allow the government to retain money that it concedes it was not owed, and have only received due to a 93 year-old man's senility." (Pet. App. 6a-7a.)

8. The court of appeals concluded that a triable issue of fact existed as to Mr. McGill's incompetence. Accordingly, it remanded the case to the district court for further proceedings.

B. *United States v. Scott*

1. From the early 1980's through at least early November, 1989, respondent Nicholas Scott (herein "Scott") was a severe alcoholic. (Pet. App. 37a.) In 1984, Scott's father, Gene Scott, acting under a power of attorney, made installments of Scott's estimated tax payments for 1984. (Pet. App. 37a.)

2. In 1989, Scott filed a tax return for 1984, claiming that he had no tax liability for 1984 and requesting a refund for amounts he had previously paid. The Internal Revenue Service denied the requested refund due to the expiration of the statute of limitations for filing a claim, based on §6511. (Pet. App. 32a.)

3. Scott brought suit following the denial of his refund claim. The district court, sitting as trier of fact, found that Scott was mentally incompetent throughout the relevant period. (Pet. App. 33a.) The district court concluded that the doctrine of equitable tolling applies in tax refund suits, and that the limitations contained in §6511 should not be applied to a person such as Scott, whose alcoholism "rendered him mentally incompetent and unable to file a tax return from January 1985 through November 1989." (Pet. App. 33a.)

4. The court of appeals affirmed, relying on the decision entered the same day by the same panel in *United States v. Brockamp*, with Judge Fernandez dissenting on the same grounds as his dissent in *Brockamp*.

SUMMARY OF ARGUMENT

A. In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court enunciated a broad rule that, once Congress has waived the Government's sovereign immunity in an area, the same rebuttable presumption of equitable tolling applicable in suits between private litigants also should apply to suits against the United States. Neither the structure of §6511 of the Code, nor the legislative history of tax refund claims, nor the legislative history of §6511, nor the overall scheme of the administration of tax collection, indicates that this rebuttable presumption should not be applied to tax refund litigation. To the contrary, although express legislative intent is sparse, the legislative history indicates Congressional intent that equitable tolling be permitted with respect to tax refund litigation.

B. The history of tax refund litigation indicates that a suit to recover overpaid taxes has been, from its inception, a common law action for money had and received, which from 1836 until 1966 could be brought against individual Collectors. Throughout this period, such suits were presumptively subject to equitable tolling, just as any suit for money had and received against a private party. When Congress finally eliminated the right to sue a Collector individually in 1966, Congress did not manifest any intent to change the nature of the action or to restrict the amenability of such suits to equitable tolling.

C. The §6511(b) limitations on the amount of a refund claim incorporate by reference the filing periods contained in §6511(a). If the time that a taxpayer has to file a refund claim is amenable to tolling, the "look-back"

periods contained in §6511(b) are tolled to the same extent. Sections 6511(a) and 6511(b) should thus be read in the conjunctive, not in the disjunctive. The legislative history of §6511 supports such an interpretation.

D. The legislative history of §6511 reveals that Congress' intent in enacting the "amount" limitations contained in §6511(b) was to prevent a taxpayer from keeping the period for filing a refund claim open indefinitely by paying a de minimis amount of tax. Specifically, the "look-back" periods in §6511(b) were designed to be co-extensive with the period of time the Commissioner has to assess a tax against the taxpayer. Section 6511(b) has no application to a disabled taxpayer who has no ability to assess his own tax and (as was the case with Mr. Stanley McGill) against whom the statute of limitations against the Commissioner never began to run.

E. The overall structure of tax collection is based upon each taxpayer assessing his or her own tax. No Congressional policy is violated by extending the period for refund claims where an overpayment is the result of the taxpayer's inability to assess his own tax.

F. In the event that the period that the taxpayer has to file a refund claim is equitable tolled, the period that the Commissioner has to assess additional tax against the taxpayer should be tolled commensurately. Such a rule would be consistent with Congress' intent to make the period that the taxpayer has to file a refund claim co-extensive with the period that the Commissioner has to assess the underlying tax.

ARGUMENT

NO GROUND EXISTS FOR NOT APPLYING THE REBUTTABLE PRESUMPTION IN FAVOR OF EQUITABLE TOLLING IN THE CONTEXT OF TAX REFUND CLAIMS.

A. THE LEGISLATIVE HISTORY OF TAX REFUND LITIGATION SUPPORTS A CONCLUSION THAT CONGRESS INTENDED EQUITABLE TOLLING TO APPLY TO SUCH SUITS.

Until the creation of the Court of Claims in 1855, no suit could be brought directly against the United States in any forum. However, as early as 1836, this Court, in *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137 permitted suits for the refund of overpaid taxes to be brought against individual Collectors. Without the benefit of statutory authority, such suits were based upon the common law action for money had and received. *Flora v. United States*, 362 U.S. 145 (1960). Used to recover upon rights equitable in nature to avoid unjust enrichment, they were the "lineal successor[s] of the common count of indebitatus assumpsit for money had and received." *Stone v. White* 301 U.S. 532, 534 (1937), "founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff." *Curtis's Administratrix v. Fiedler*, 67 U.S. (2 Black) 461 (1862). Such suits were equitable in nature,

> " . . . less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds the money, which *ex aequo et*

> *bono* belongs to the plaintiff. . . . It approaches nearer a bill in equity than any other common law action." *United States v. Jefferson Electric*, 291 U.S. 386, 402 (1933) *citing Claflin v. Godfrey*, 38 Mass. 1, 6."

As such suits were legal actions brought against individuals, they were presumptively amenable to equitable tolling, just as any action for money had and received brought against a private individual. Beginning in 1836, *and for the next 130 years*, refund suits in the nature of common law actions for money had and received could be maintained against individual Collectors for the refund of overpaid taxes.[3]

As a result of this Court's holding in *Elliott v. Swartwout*, Collectors began withholding tax collections, for fear that they could be personally liable for taxes wrongfully collected. To thwart this, Congress, in the Act of March 3, 1839, 5 Stat. 339, required Collectors to remit all taxes collected to the Treasury. In 1845, this Court, in *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845), held that, as a result of the Act of March 3, 1839, individual Collectors merely performed the ministerial act of collecting and remitting for the Treasury. Consequently, no right of action against Collectors for refund existed.

Congress' reaction was swift and decisive. Within weeks of this Court's decision in *Cary v. Curtis*, Congress enacted the Act of February 26, 1845, 5 Stat. 727, which expressly restored the taxpayer's right to sue for refund.

---

[3] The history of refund actions against Collectors was extensively reviewed in Plumb, Jr. *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 685 (1947).

Elliott v. Swartwout dealt with customs duties wrongfully collected. In *Elliott*, this Court required that the taxpayer protest the exaction of the tax as a prerequisite to a refund suit, because a sum of money *voluntarily* paid could not form the basis of a common law action for money had and received.[4] *United States v. Williams*, ___ U.S. ___ (1995). The present requirement that a refund suit be preceded by a refund claim thus originated in the common law action for money had and received. In 1866, this Court, in *City of Philadelphia v. The Collector*, 72 U.S. (5 Wall.) 720 (1867) extended the common law action for money had and received to actions for the recovery of internal revenue taxes, noting that:

> "there is no more appropriate or effectual remedy known to the common law than an action for assumpsit for money had and received, as in this case." *Id.* at 733.

In 1875, Congress acted to indemnify Collectors. Rev. Stat. §989; 28 U.S.C. §842 (1940). But the indemnification was not automatic. In order to be indemnified, the Collector required certification by a court that there was probable cause for the act done by the Collector. *United States v. Kales*, 314 U.S. 186 (1941).

The truly private nature of the action against the Collector is evidenced by the fact that if the individual Collector who had exacted the tax died during the pendency of the refund action, the action could not be maintained against his successor in office; the action could be

---

[4] The prerequisite of a protest was eliminated by statute in 1924. Revenue Act of 1924 at §1014, 43 Stat. 343.

continued only against the estate of the deceased Collector. *Smietanka, Collector v. Indiana Steel Co.*, 257 U.S. 1 (1921).

The Government first became directly amenable to suits for tax refunds with the enactment of the Act of March 3, 1887, 24 Stat. 505, commonly known as the Tucker Act. But the Tucker Act did not, and was not intended, to impose any new conditions on the pre-existing right to sue the Collector for tax refunds. *Flora v. United States*, 362 U.S. 145, 189 (1960) (Whittaker, J. dissenting). Indeed, if the taxpayer's claim was for an amount in excess of $1,000 (later increased to $10,000) the taxpayer's only action was a suit against the Collector. Even if the amount was under the jurisdictional ceiling, the taxpayer had the option to sue the Collector for refund. Significantly, the enactment of the Tucker Act did not change the nature of the action against the Collector, which continued to be a common law action for money had and received against a private individual. *United States v. Kales*, 314 U.S. 186, 200 (1941). *Accord: Lewis v. Reynolds*, 284 U.S. 281, 283 (1932).

The dual nature of tax refund suits continued into the modern era, with the taxpayer having the choice of suing the Collector individually, or the United States directly, either in District Court up to the jurisdictional amount, or in the Court of Claims without regard to the jurisdictional amount. Not until 1954, with the enactment of the Act of July 30, 1954, ch. 648, 68 Stat. 589, §1, was the $10,000

ceiling on refund suits brought in District Court eliminated.[5]

The right of the taxpayer to sue the individual District Director (formerly the Collector) was not abrogated until 1966, with the enactment of §7422(f)(1) of the Code.[6] But the legislative history of this provision reveals that such suits were eliminated to aid the practitioner, who prior thereto had been caught in the trap of either suing the wrong Collector, or having had the right Collector die during the pendency of the litigation. The Senate Report also reveals that the right to sue the District Director was eliminated because the number of District Directors was reduced from 58 to seven, Congress fearing that these suits would thus be concentrated in seven districts. S. Rep. No. 1625, 3 U.S. Code Cong. & Admin. News 3681 (1966).

Nowhere does the 1966 legislative history reveal any intention on the part of Congress to change the nature of tax refund litigation from what it had been since 1836, *viz*, a common law action on a debt.

As the Petitioner correctly notes, the ability to bring a refund suit against a Collector began in 1836, yet the requirement that such a suit be preceded by a refund claim was not enacted until 1875. But contrary to the

---

[5] Also eliminated as no longer necessary was the provision that a refund suit for an amount in excess of $10,000 could be maintained if the Collector was either dead or no longer in office. With this provision, 28 U.S.C. §1346(a)(1), the direct descendent of the Tucker Act, assumed its current form.

[6] Section 7422(f) was added by §2(a) of Pub. L. 89-713, 89th Cong. 2d Sess.

Petitioner's assertions, nowhere does the legislative history of tax refund litigation indicate an "inflexible" requirement that refund claims be timely filed and not be amenable to tolling in a proper circumstance. Since 1836, tax refund suits have been in the nature of common law actions for money had and received. At least until 1966, they were as amenable to equitable tolling as any common law action against a private party, and nothing in the 1966 legislation reveals an intent on Congress' part to abridge the amenability of such suits to equitable tolling.[7]

---

[7] In *Webb v. United States*, 66 F.3d 691 (1995), the Fourth Circuit distinguished this Court's holding in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), by limiting the rebuttable presumption in favor of equitable tolling to those cases where comparable causes of action may be brought against a private individual and the Government, holding:

> " . . . when equitable tolling applies in a case brought against a private litigant, it follows that equitable tolling should presumptively apply in a comparable case against the United States." *Id.* at 697.

This interpretation of this Court's holding in *Irwin* was not advanced by the Petitioner either in *Webb* or in either of the consolidated cases at bar. It is apparent that, in holding that equitable tolling is inapplicable to tax refund claims, the Fourth Circuit was unaware that actions seeking the refund of overpaid taxes were maintainable against *private litigants* for 130 years. Since *Irwin*, courts have consistently applied equitable tolling in suits against the Government without reference to whether a particular statute allows suits against both the Government and a private party. *See, e.g., Capital Tracing, Inc. v. United States*, 63 F.3d 859 (9th Cir. 1995) [wrongful tax levy action]; *Medellin v. Shalala*, 23 F.3d 197 (8th Cir. 1994) [Social Security Act]; *Nunnally v. MacCausland*, 996 F.2d 1 (1st Cir. 1993) [Civil Service Reform Act]. The Fourth Circuit's holding in *Webb* has been severely criticized in Bianco, *Tax Refund Suits and Equitable Tolling of the Statute of Limitations: Webb v. United States*, 49 Tax Lawyer 747 (1996).

B. THE STRUCTURE OF §6511 IS SUCH THAT IF THE PERIODS IN §6511(a) ARE AMENABLE TO TOLLING, THE "LOOK-BACK" PERIODS IN §6511(b) SHOULD BE TOLLED FOR THE SAME PERIODS.

As this Court recently observed in *Commissioner v. Lundy*, ___ U.S. ___ (1996) the "look-back" periods contained in §6511(b)(2)(A) and §6511(b)(2)(B), which limit the amount of any refund, incorporate by reference the claim-filing periods of §6511(a).

If the periods in which a taxpayer is required to file a refund claim are amenable to equitable tolling, the "look-back" periods contained in §6511(b)(2), which incorporate these periods by reference, should be amenable to tolling to the same extent. The legislative history of §6511(b) and its predecessors supports this conclusion.

C. THE LEGISLATIVE HISTORY OF §6511(b) REVEALS THAT THE "LOOK-BACK" PERIODS OF §6511(b) WERE NOT INTENDED TO BE ABSOLUTE BARS, BUT WERE INTENDED TO MAKE THE TIME THAT A TAXPAYER HAS TO FILE A REFUND CLAIM CO-EXTENSIVE WITH THE PERIOD THAT THE COMMISSIONER HAS TO ASSESS A TAX AGAINST THE TAXPAYER.

The first statutory provision permitting the filing of a claim for the refund of income taxes was contained in §14(a) of the Revenue Act of 1916, Pub. L. No. 271, ch.

463, 39 Stat. 772, §14(a).[8] However, it was not until the Revenue Act of 1918, Pub. L. No. 254, ch. 18, §252, 40 Stat. 1057, 1085, that the first time limitation on refund claims was enacted:

> " . . . if, upon examination of any return of income made pursuant to this Act . . . it appears that amount of income, war-profits or excess profits tax has been paid in excess of that properly due, then, . . . any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

A five-year period was selected, for that was the period the Commissioner then had to assess a tax against the taxpayer. S. Rep. No. 617, 65th Cong., 3rd Sess. at 10, *cited in* J. Seidman, Legislative History of Federal Income Tax Laws, 1938-1861, 937-938 (1938).

One fact becomes readily apparent from a reading of this provision: If a taxpayer were to pay a *de minimis* amount of tax and file a refund claim therefor within the five-year period, the period in which the Commissioner was required to make a refund for that particular tax year would be extended indefinitely.

---

[8] It provided, in pertinent part:

> " . . . upon the examination of any return of income made pursuant to this title . . . if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof. . . . "

An additional restriction was added in the Act of March 4, 1923, ch. 276, §252(a), 42 Stat. 1504, which required the taxpayer to file a refund claim within two years of the time the tax was paid. Nevertheless, if the taxpayer paid a *de minimis* amount and then filed a claim therefor, the taxpayer had effectively kept the period for filing refund claims for that particular tax year open indefinitely.

Only one year later, in order to eliminate such gamesmanship, Congress enacted §281(b) of the Revenue Act of 1924, Pub. L. 176, ch. 234, 43 Stat. 301, which reduced the claim-filing period from five years to four, and which provided the first limitation on the *amount* of any refund claim:

> " . . . (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before such expiration or such four years a claim therefor is filed by the taxpayer nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund."

The Senate Report accompanying this provision, which is the most revealing expression of legislative intent in the history of tax refund legislation, provides, in pertinent part:

> "In order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax, a limitation has been inserted by the committee restricting the amount of credit or refund to the portion of

> the tax paid during the four years immediately preceding the filing of the claim."[9]

S. Rep. No. 398, 68th Cong. 1st Sess. 33 (1924), *cited in* J. Seidman, *supra*, 767-768.

Contrary to the Petitioner's assertion that §6511(b)(2) is designed to cut-off "stale claims,"[10] Congress' intent in enacting the predecessor to §6511(b) is manifest: It was to prevent the Commissioner from being whipsawed by sharp taxpayers. The statutory regime prior to the Revenue Act of 1924 encouraged taxpayers to pay a *de minimis* amount of tax and file a refund claim therefor, thereby holding the period for refunds of greater amounts for that tax year open indefinitely. But the period that the Commissioner had to assess additional tax for that year was not extended by the taxpayer's refund claim, since the

---

[9] The Senate floor discussion with respect to this amendment is as follows:

> MR. McKELLAR. This amendment seems to provide that a taxpayer may not reopen a claim.
>
> MR. SMOOT. He may not reopen it by simply paying a small amount, say a few dollars on it. I will, in a very few words, state what that means.
>
> . . .
>
> MR. SMOOT. This subdivision has been rewritten to limit the amount of refunds and credits to the portion of the tax paid within four years preceding the filing of the claim, in order that the taxpayer may not, by a small payment, reopen the entire case. It is better written, and is exactly the same as the rules and regulations now in force.

65 Cong. Rec. 7209 (1924), *cited in* J. Seidman, *supra*, 767-768.

[10] See Petitioner's Brief at 20, n. 12

period the Commissioner has to assess a tax is governed by separate statutory limitations.

Section 281 of the 1924 Act was carried through to §322 of Internal Revenue Code of 1939, modified by the shortening of the period of refund claims from the time of payment from four years to two years. *Jones, Collector v. Liberty Glass Co.*, 332 U.S. 524 (1947).

Section 322 was amended in 1942 in one revealing respect. Section 322(b)(3) thereof was added, to provide that if the Commissioner and the taxpayer had, by agreement, extended the time for which the Commissioner could assess a tax, then the period for which the taxpayer could file a refund claim was extended for a commensurate period, plus six months. Revenue Act of 1942, ch. 619, Pub. L. No. 753, §169. This amendment was explained by the Ways and Means Committee as follows:

> "Your committee has amended the existing law to permit the taxpayer to file a claim for credit or refund after the ordinary period of assessment has expired where the taxpayer and the Commissioner have by waiver extended the period of assessment of the tax. It seems only proper that if the Government is given the right by waiver to make assessments for the taxable year after the period for assessment has expired, the taxpayer should also have the right to additional time for filing refund claims for the same year." H.R. Rep. No. 2333, 77th Cong. 2d Sess. at 52, *cited in* 2 J. Seidman, Legislative History of Federal Income and Excise Profits Tax Laws, 1953-1939, 2272 (1954).

Here again, Congress manifested its intent to make the period for which the taxpayer could file a refund claim

co-extensive with the period the Commissioner had to assess the underlying tax.

Section 322 of the 1939 Code was carried through to §6511 of the Internal Revenue Code of 1954. But §322(b) of the 1939 Code differed from §6511(a) of the 1954 Code, as first enacted, in one significant particular: Under §322(b)(1) of the 1939 Code, the time for filing a refund claim commenced on the date the return was *filed;*[11] under §6511(a) of the 1954 Code, as first enacted, the time for filing a refund claim commenced on the date the return was *due.*[12] 15 Mertens, *Law of Federal Income Taxation*, §58.02 at 7 (1996).

---

[11] Section 322(b)(1) of the 1939 Code provided, in pertinent part:

> "(1) Period of Limitation. – Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after whichever of such periods expires the later."

[12] As first enacted, Section 6511(a) provided, in pertinent part:

> "(a) Period of Limitation on Filing Claim. – Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was required to be filed (*determined without regard to any extension of time*) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." [Emphasis added.]

This distinction is more than historical. The First Circuit's analysis of the interplay of §6511(b) and §6511(a) in *Oropallo v. United States*, 994 F.2d 25 (1993), *cert. denied*, 114 S. Ct. 705 (1994), upon which the Petitioner relies,[13] is expressly premised upon the First Circuit's assumption that the three-year period for filing a refund claim can begin to run with a *late-filed return.*[14] The First Circuit reasoned that if a late-filed return could form the basis for a refund claim, then the limitation periods contained in §6511(a) are illusory. If §6511(a) represents an illusory statute of limitations, then the "look-back" periods contained in §6511(b) must represent untollable bars, in order to save §6511 from being totally illusory.

A comparison of §322(b)(1) of the 1939 Code and §6511(a) of the 1954 Code, as first enacted, reveals that the First Circuit's premise was probably correct under the 1939 Code, but is incorrect under the 1954 Code: A late-filed return cannot begin the three-year period for refund claims; as first enacted, the period for filing refund claims commenced with the due date of the return, regardless of when the return was filed.[15]

---

[13] See Petitioner's Brief at pp. 35-36.

[14] The First Circuit's assumption that the three-year period for filing a refund claim contained in §6511(a) could commence with a late-filed return was rejected by the Ninth Circuit in *Miller v. United States*, 38 F.3d 473 (1994).

[15] The First Circuit's analysis in *Oropallo* has been heavily criticized in the scholarly literature. *See* Danos, "Special Report," *Tax Notes*, April 17, 1995, at 395, and Stein, "Will Equitable Tolling of the Statute of Limitations Gain Wider Acceptance in Tax Cases?" 81 J. Tax'n, 370 (Dec. 1994). No

Section 6511(a) was last amended by Section 82 of the Technical Amendments Act of 1958. The period for filing refund claims was amended to commence with the due date of the return plus any extensions thereof. In order to correlate the "look-back" periods in §6511(b) to the periods in §6511(a), §6511(b) was amended, and the phrase "plus the period of any extension of time for filing the return" added to §6511(b)(2)(A). 15 Mertens, *Law of Federal Income Taxation*, §58.02, at 7 (1996).

Although no legislative history of this 1958 amendment has been found, a contemporaneously prepared explanation of the 1958 Technical Amendments Act prepared by Commerce Clearing House notes that the change was made to conform to the rule for *assessments;* i.e., the tax refund "look-back" periods contained in §6511(b) were intended to mirror the period the Commissioner has to assess a tax. "1958 Federal Income Tax Law Changes Explained," ¶291, No. 39, (CCH) Stand. Fed. Tax Rep., Sept. 4, 1958. That period commences on the date the taxpayer who has obtained an extension actually files the return, not on the due date of the return.

The long history of §6511(b) and its progenitors reveals that, contrary to the Petitioner's unsupported assertion, §6511(b) is not intended as a bar to "stale claims," but is intended to prevent sharp taxpayers from extending the period for filing refund claims beyond the period the Commissioner has to assess a tax. As Professor

---

scholarly article approving of the First Circuit's analysis in *Oropallo* has been found.

Saltzman concludes in his monumental treatise, *IRS Practice and Procedure*:

> "Limitations on the time for filing a claim for refund and on the amount of the credit or refund are related to the period the Service has to assess a deficiency. Normally, a deficiency in tax must be assessed within three years from the date a return is filed. Consequently, where a taxpayer files a claim for refund within three years after filing a return, the Service is not foreclosed from examining the return and assessing a deficiency. During the assessment period, both the taxpayer and the Service are able to question the entire amount of the tax reported on the return. However, as previously noted, once the period of limitations on assessment has expired, the Service is not permitted to assess additional tax for the year. Therefore, the rules limiting the amount refundable on claims a taxpayer files outside the three-year assessment period put the taxpayer in the same position as the Service: neither can use an error in the return affirmatively, neither the taxpayer by seeking to obtain a refund nor the Service by attempting to collect additional tax.
>
> "By limiting the amount of credit or refund to the tax paid during the two years immediately preceding the claim, the taxpayer is prevented from extending the time for filing a claim for refund of the tax paid or deemed paid on the due date by the expedient of making a late payment of a small portion of the tax due. Also, since the Service is prohibited from assessing additional tax and can simply defend the government's entitlement to the allegedly overpaid tax, the taxpayer is similarly restricted by being

> permitted only to contest liability for the tax paid within the prior two years. Therefore, a taxpayer who files a claim more than three years after the return is due is generally restricted to recovering an assessed and paid tax deficiency." ¶11.05 at 11-26 - 11-27 (2d ed. 1991).

If the §6511(b) limitations on credit or refund are intended to limit the recovery of an *assessed tax*, it begs the question what possible application these limitations could have to a taxpayer – such as Stanley McGill – who, due to his disability, could not file a timely tax return, and who, as a result of his failure to file, could not begin the period of assessment against the Commissioner. As a result of his inability to file a return, the period of limitation on the Commissioner to assess a tax against Mr. McGill was *tolled*. Indeed, the period of assessment was tolled throughout the remainder of his life. If the period of limitations for assessment was thus tolled, and if the intent of §6511(b) was to make the period for filing refund claims co-terminous with the period the Commissioner has to assess a tax, the "look-back" periods of §6511(b) should be tolled to the same extent.

D. THE OVERALL STRUCTURE OF OUR SYSTEM OF TAX COLLECTION, BASED AS IT IS UPON SELF-ASSESSMENT, SUPPORTS A CONCLUSION THAT CONGRESS INTENDED EQUITABLE TOLLING TO APPLY TO TAX REFUND CLAIMS.

Our "complex and comprehensive" system of tax collection is grounded upon a system of self-assessment. *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984).

Each year, every citizen or resident is required to compute his own income, determine his own tax liability, and forthrightly report that tax liability to the Treasury on forms prescribed by the Commissioner. *Commissioner v. Dane-Wells*, 321 U.S. 219 (1944). Each such form must be executed by the taxpayer *under penalty of perjury*.

In the event that the taxpayer later discovers that he has overpaid his taxes and desires a refund, he is required to first file a claim for refund. That refund claim must set forth, in detail, the *exact* grounds upon which the claim is based, and it too must be executed under the penalty of perjury. A claim that does not comply with these requirements will not be considered a refund claim for any purpose. Treas. Regs. §301.6402-2(b) (1977). If the claim is denied, and the taxpayer later brings suit to recover the overpaid tax, any material difference between the "exact grounds" contained in the refund claim and the taxpayer's complaint will be attacked as containing a fatal *variance*. *See, e.g., United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269 (1931).

In *Irwin v. Veterans Affairs*, 498 U.S. 89 (1990), this Court enunciated a broad rule to the effect that once Congress has waived its sovereign immunity in a given area, then making the rule of equitable tolling applicable to suits against the government is "likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation," warranting a "rebuttable presumption" in favor of tolling. *Id.* at 95.

At bottom, the Petitioner maintains that in our system of self-assessment, Congress *intended* that the same restrictions and limitations that apply to taxpayers in

possession of their faculties must apply with equal force to taxpayers who have no ability to assess their own taxes, no ability to appreciate the penalties of perjury, and no ability to compose a refund claim. Moreover, the Petitioner maintains that Congress *intended* to create regime of tax collection whereunder the period of time that a disabled taxpayer has to file a refund claim may have expired while – due to the taxpayer's inability to file a tax return – the period of limitation on the Commissioner to assess the underlying tax may not yet have begun.

E. IN THE EVENT THAT THE PERIOD THAT A TAXPAYER HAS TO FILE A REFUND CLAIM IS TOLLED, THE PERIOD THAT THE COMMISSIONER HAS TO ASSESS ADDITIONAL TAX SHOULD BE TOLLED FOR A COMMENSURATE PERIOD.

Respondent suggests that in the event that the period that the taxpayer has to file a refund claim is tolled, then the period that the Commissioner has to assess a tax against the taxpayer for that tax year should be tolled commensurately. Such a rule would be consistent with the goal of §6511(b), which is to make the period that the taxpayer has to file a refund claim co-extensive with the period that the Commissioner has to assess the underlying tax. If such a rule were adopted, a taxpayer asserting the doctrine of equitable tolling would do so with the full knowledge that if reasonable cause for invoking the doctrine were found, it would have the effect of opening the entire tax year for review, thus limiting the availability of equitable tolling only to those who were truly prevented from filing a refund claim on a timely basis.

CONCLUSION

The judgment of the court of appeals in *United States v. Scott* should be affirmed. The judgment of the court of appeals in *United States v. Brockamp* should be affirmed, with the case remanded to the District Court for further proceedings.

Respectfully submitted.

ROBERT F. KLUEGER, Esq.
BOLDRA & KLUEGER

August 29, 1996